Enercon Testing & Balancing Corp. *and* Steven Skolnik. Case 2–CA–31303

June 23, 1999

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On March 3, 1999, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief answering the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs,[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

We agree with the judge that, pursuant to the *Wright Line*[4] standard, the General Counsel proved that Steven Skolnik's protected union activity was a motivating factor in the Respondent's discharge of Skolnik on November 15, 1997, and that the Respondent did not sustain its *Wright Line* burden of showing that it would have selected Skolnik for layoff even in the absence of his protected activity. Without rejecting the Respondent's contention that work was slow in mid-November, the judge discredited the testimony of Alex Spielman, the Respondent's owner, that his selection of Skolnik for layoff was motivated by nondiscriminatory business considerations. We note that the judge's conclusion in that regard was supported not only by his consideration of Spielman's demeanor, but by the absence of any documentary evidence or other testimony providing reasons why Skolnik should be selected, and by affirmative evidence that the focus was on other employees for selection until Skolnik's union activity became apparent. Thus, prior to his becoming aware of Skolnik's union activity, Spielman's focus was solely on either Jimmy Higgins or Robert Butler, two less-experienced employees, as the candidate for an economic layoff. The focus shifted to Skolnik, and he was chosen for layoff instead of Butler or Higgins, only *after* Spielman was informed of Skolnik's activity. Finally, we note the testimony credited by the judge that, in a mid-December 1997 meeting involving Spielman, Skolnik, and Union Representative George Andrucki concerning Skolnik's employment status, Spielman effectively stated that Skolnik's union activity, not a lack of work, was the reason Spielman would not employ him.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Enercon Testing & Balancing Corporation, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter the following subparagraphs accordingly.

"(a) Within 14 days from the date of this Order, offer Steven Skolnik full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

"(b) Make Steven Skolnik whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision."

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against employees because they engage in union or other concerted activity for mutual aid or protection.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Steven Skolnik full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his

[1] We grant the General Counsel's motion to strike references in the Respondent's exceptions brief to apparent settlement discussions between the Charging Party and the Respondent, as these matters are not part of the record in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[4] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB. v. Transportation Management Corp*., 462 U.S. 393 (1983).

seniority or any other rights or privileges previously enjoyed.

WE WILL make Steven Skolnik whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Steven Skolnik, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ENERCON TESTING & BALANCING CORP.

Susannah Ringel Esq., for the General Counsel.
Neil M. Frank Esq. and *Saul Zabel Esq.,* for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York on November 19 and 20, 1998. The charge was filed on March 5, 1998, and the complaint was issued on May 29, 1998. In substance, the complaint alleged that on November 15, 1997, the Respondent laid off and subsequently discharged Steven Skolnik because of his activity in seeking to enforce a collective-bargaining agreement between the employer and Sheet Metal Workers' International Association, Local 28. The Company asserts that this was not the case; that it laid off Skolnik because work was slow.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Company performs testing and balancing services in relation to HVAC systems. It has a collective-bargaining agreement with Local 28, Sheet Metal Workers International Association through an employer association. The Company's employees who do testing and balancing are covered by the agreement which, by its terms prohibits employees not covered by the agreement from doing this and certain related work. The Company usually employs about four to five technicians who are covered by the union agreement. It also employs a small group of other employees who are not in the bargaining unit.

The owner of the Company is Alex Spielman and he also owns a related company, operating out of the same address. This other company does work that is not covered by the aforesaid collective-bargaining agreement. Employees of that company are nonunion.

Steven Skolnik, a balancing technician and bargaining unit employee, began his employment at the Company in or about 1988. He was discharged in November 1997. The evidence indicates that Skolnik was a good employee who had an amicable relationship with Spielman until the events transpiring in this case.

According to Spielman, in December 1996 or January 1997, the company having some difficulty getting jobs, he decided to spend more of his time drumming up sales. Spielman then assigned Skolnik the title of operations manager and gave him some of the functions that Spielman had been performing. In addition to performing the normal tasks of a field technician, these included various office functions such as scheduling, billing, collections, etc. Skolnik was also paid an extra $100 per week and this represented a sort of compromise. That is, although Skolnik's new duties came with a raise, that amount given his new hours of work, was less than what he would have made if he was compensated on the basis of the overtime rates contained in the collective-bargaining agreement. Thus, both Spielman and Skolnik were not averse to bending the collective-bargaining agreement when it suited them both. When Skolnik became the operations manager, the number of full-time field technicians went from five to four.

Given the fact that Skolnik was promoted to do some of the functions normally performed by Spielman, including responding to questions from the field, this tends to undermine any contention that Skolnik's job performance was weak in relation to the other bargaining unit employees.

The evidence shows that for some time, the Company assigned an office worker, Lana Mitnistsky, to do "print preparation" which is work covered by the collective-bargaining agreement and which is required to be done by a bargaining unit employee who is supposed to affix his stamp to a drawing. Although Spielman contends that he expected Skolnik to do this work when he moved Skolnik into the office. Skolnik credibly asserts that Spielman wanted to have Mitnistsky continue that work and have Skolnik affix his stamp to it. This Skolnik refused to do and Mitnistsky continued to do this task for some time up until November 1997.

During the summer and fall of 1997, the Company, on a few occasions, utilized two people to do air balancing work on jobs which were covered by the collective-bargaining agreement.[1] Skolnik testified that in September 1997 he asked Spielman about one of these people and was told not to worry about it. Skolnik responded that he didn't think that it was right to put nonunion people on to do union work.

On November 7, 1997, Union Representative George Andrucki visited the shop while Spielman was out of town. While there he noticed that Mitnistsky was doing the print preparation work.

On November 10, 1997, Spielman returned to the office and told Skolnik that he was thinking of laying off either Jimmy Higgins or Robert Butler (both junior employees). He asked Skolnik for his opinion and Skolnik replied that he didn't think it was right to lay off any union employees if the Company was using nonunion people to do bargaining unit work. On that same evening, Skolnik called another union agent, Fred Amato, and told him that he heard that the Company was going to assign a nonunion worker to do a job at Bay Park.

[1] One of these, Thomas Beauchamp, was put on the payroll of Spielman Associates, the other company owned by Spielman. The other person was D.J. Cirit who was engaged ostensibly as a subcontractor. It is conceded that both of these individuals occasionally did work that which was covered by the collective-bargaining agreement and which should have been assigned to Local 28 members.

On November 11, 1997, Business Agent Joseph Minieri confirmed that Beauchamp was working at the Bay Park job. On November 12, Spielman told Skolnik that the Union had caught Beauchamp at the Bay Park job and that he no longer could trust Skolnik to be in the office. He thereupon assigned Skolnik to a field job with Jimmy Higgins.

On November 15, 1997, Spielman told Skolnik that he would have to stay home for a couple of weeks because work was slow. Thereafter, on December 3, 1997, the Company sent a letter to Skolnik advising him that his layoff was extended "until further notice." Skolnik was never recalled to work.

On November 24, 1997, the Union filed a grievance under the collective-bargaining agreement regarding the company's use of Beauchamp to do bargaining unit work.

At a meeting between Spielman, Skolnik, and Union Agent Andrucki in mid-December 1997, Spielman said in substance that Skolnik had decided that he was going to be a big union man and that he no longer could trust Skolnik as he had brought the Union into the Company's affairs.

Spielman's testimony is in my opinion, essentially consistent with the testimony of Andrucki and Skolnik in that he admits that he no longer wanted Skolnik working in the office because he was incensed that Skolnik allowed the Company to get into trouble with the Union. Spielman's testimony implied that he believed that Skolnik had either called Andrucki to visit the shop or allowed him in to discover that Mitnistsky was doing unit work. In my opinion, Spielman blamed Skolnik for the fact that Andrucki found out that the Company was breaching the contract and thought it likely that the Union would probably take some course of action against him (which it did).

On December 17, 1997, the Union filed a grievance regarding both the layoff of Skolnik and the assignment of the drawing work to an office employee. All three grievances were thereafter heard by the Joint Adjustment Board, a panel of employer and union representatives authorized to make decisions on contract grievances. While the Joint Adjustment Board concluded that the Company had violated the contract in relation to the work assignment disputes, it deferred the layoff of Skolnik to the National Labor Relations Board.

III. ANALYSIS

In *NLRB v. City Disposal Systems, Inc.* 465 U.S. 822 (1984), the Supreme Court upheld the Board's doctrine enunciated in *Interboro Contractors, Inc*., 157 NLRB 1295, enfd. 388 F.2d 495 (2d Cir. 1967), and held that an employee who reasonably and honestly invokes a right derived from a collective-bargaining agreement, is engaged in concerted activity under Section 7 of the Act and cannot be discharged for engaging in such activity. The Court stated:

> The invocation of a right rooted in a collective-bargaining agreement is unquestionably an integral part of the process that gave rise to the agreement. That process—beginning with the organization of a union, continuing into the negotiation of a collective-bargaining agreement, and extending through the enforcement of the agreement—is a single, collective activity. . . . [465 U.S. at 831–832.]
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> . . . Moreover, by applying Section 7 to the actions of individual employees invoking their rights under a collective-bargaining agreement, the *Interboro* doctrine preserves the integrity of the entire collective-bargaining process; for by invoking a right grounded in a collective-bargaining agreement, the employee makes that right a reality, and breathes life, not only into the promises contained in the collective-bargaining agreement, but also into the entire process envisioned by Congress and the means by which to achieve industrial peace. [Id. at 835–836.]
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> Indeed it would make little sense for Section 7 to cover an employee's conduct while negotiating a collective-bargaining agreement, including a grievance mechanism by which to protect the rights created by the agreement, but not to cover an employee's attempt to utilize that mechanism to enforce the agreement. [Id. at 836.]

In accordance with *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), if the General Counsel makes out a prima facie showing sufficient to support an inference that protected or union activity was a motivating factor in the decision to discharge or take other adverse action against an employee, then the burden shifts to the Respondent to demonstrate that it would have taken the same action in the absence of the protected activity.

In the present case, I am convinced that the Company's initial decision to transfer Skolnik out of the office and thereafter to lay him off, was motivated by Spielman's belief that Skolnik was causing him union troubles by reporting breaches of the collective-bargaining agreement to the Union. Even if work was somewhat slow in the late fall and winter of 1997, I do not accept the assertion that the selection of Skolnik for layoff was motivated by legitimate business reasons or because he was the least capable field employee to do the work that was being done at the time.[2] I credit Skolnik's testimony that when Spielman returned from the trade show he spoke about the possibility of laying off one employee, and asked Skolnik whether it should be Higgins or Butler.

CONCLUSION OF LAW

By discharging Steven Skolnik because of his union activity, and because the employer believed that he was seeking to enforce the existing collective-bargaining agreement with Sheet Metal Workers International Association, Local 28, the Respondent has violated Section 8(a)(1) and (3) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Steven Skolnik, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of his reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[3]

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[2] I note that the other employees were willing to reduce their hours in order to keep Skolnik on the job.

[3] The Respondent asserts that in any event, Skolnik would have been laid off for nondiscriminatory reasons at some time after November 15, 1997. I shall leave that question for compliance.

ORDER

The Respondent, Enercon Testing & Balancing Corp., New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of their support or activities on behalf of Sheet Metal Workers International Association, Local 28 or any other labor organization or because of any concerted activity protected by Section 7 of the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Steven Skolnik, full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Steven Skolnik and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 15, 1997.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."